a crime, there being no *mens rea* originally, the defendant cannot be held criminally for the second act which he did not intend.[17] (3) It is constitutional to have no trial by jury in the case of a public tort.[18] (4) The plea of double jeopardy is not open to one convicted of a public tort, when accused of a crime on the same facts.[19] This case usually arises where an ordinance prescribes a penalty, and a statute inflicts imprisonment, for the same offense. Finally, it may be suggested that the ordinary requirement that the prosecution prove its case beyond a reasonable doubt does not extend to public torts.[20]

WHO PAYS FOR THE WIFE'S DEFENSE IN A DIVORCE ACTION?—Now that women sit in legislatures and upon juries, we may well wonder to find still blooming a doctrine which flowered when the married woman was at law the equal of the infant and the idiot. An English woman recently sued for divorce on the grounds of adultery, obtained the "usual interlocutory order" for costs.[1] This order required the husband to furnish suit-money[2] for her defense.[3] In England it has always been the established rule[4] that the solicitor who in good faith[5] and for prob-

[17] State *v.* Horton, 139 N. C. 588 (1905). Where the defendant violates a police ordinance regulating speed, and thereby injures another, he is not guilty of assault and battery. Comm. *v.* Adams, 114 Mass. 323 (1873). On the other hand, if the legislature makes the act a crime by prescribing imprisonment, the defendant may be held for manslaughter. People *v.* Harris, 182 N. W. 673 (Mich., 1921). This principle has been lost sight of in a few cases, where the defendant has been held guilty of manslaughter, although the statute in question provided merely a money penalty. See State *v.* Gash, 177 N. C. 595, 99 S. E. 337 (1919); Bell *v.* State, 7 Ohio App. 185 (1918); State *v.* Rountree, 106 S. E. 669 (N. C., 1921). See also State *v.* Collingsworth, 82 Ohio St. 154, 92 N. E. 22 (1910).

[18] Williams *v.* Augusta, 4 Ga. 509 (1848), approved Floyd *v.* Commissioners, 14 Ga. 354 (1853); Sutton *v.* McConnell, 46 Wis. 269, 280, 50 N. W. 414, 416 (1879). See also 1 DILLON, MUNIC. CORP., 4 ed., § 433. But see *contra*, Creston *v.* Nye, 74 Iowa, 369 (1888). In Byers *v.* Comm., 42 Pa. St. 89 (1862) the court held no jury trial necessary although imprisonment was the punishment. This is clearly wrong.

[19] Leitchfield Merc. Co. *v.* Comm., 143 Ky. 162, 136 S. W. 639 (1911). But see *contra*, State *v.* Cowan, 29 Mo. 330 (1860), where the lightness of the imprisonment (five days) undoubtedly influenced the court. The court carried too far the principle here advocated in State *v.* Clifford, 45 La. Ann. 980 (1893), where imprisonment was provided. See also Jenkins *v.* State, 14 Ga. App. 276, 80 S. E. 688 (1914), commented on in 27 HARV. L. REV. 681.

[20] Peterson *v.* State, 79 Neb. 132, 112 N. W. 306 (1907).

[1] Franklin *v.* Franklin, [1921] P. 407. For the facts of this case, see RECENT CASES, *infra*, p. 470.

[2] In England "suit-money" is known as "costs." See 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 973. Such "costs" are allowed *pendente lite*, and must be distinguished from ordinary costs, which, though in the discretion of the court since THE MATRIMONIAL CAUSES ACT of 1857 (20 & 21 VICT., c. 85, § 51), usually follow the event, apparently by analogy to rule 1, order LXV, RULES SUPREME COURT OF JUDICATURE (1883). See RAYDEN, DIVORCE, 193.

[3] Such orders are made under the authority of Divorce Rules made in accordance with the provisions of the JUDICATURE ACT (38 & 39 VICT., c. 77, § 18). See DIVORCE RULES 158 and 159 (26 Dec., 1865), and 201 (14 July, 1875) collected in RAYDEN, DIVORCE, 301 *et. seq.*

[4] See SHELFORD, MARRIAGE AND DIVORCE, 533; 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 973.

[5] The husband need not pay where the defense is fictitious. Clark *v.* Clark, 4 Sw. & Tr. 111 (1865). Or unreasonable. Kershaw *v.* Kershaw, 23 T. L. R. 296 (1907).

able cause [6] defends or prosecutes a divorce suit for the wife may recover at law from the husband a reasonable compensation, whether successful or not.[7] In some obvious cases — such as a frivolous defense — the husband is excused; [8] but normally, as long as the marital tie — however strained — still binds,[9] he must pay. To insure such payment, courts have been willing to enjoin husbands from receiving legacies till they complied with their orders.[10]

In America the authorities are in every form of conflict, resulting in nothing which can be called an American doctrine.[11] Some few states appear to follow England; [12] the others hesitate [13] or refuse.[14] It would serve no purpose to trace the tortuous ramifications of individual state doctrines; these involve statutes,[15] wholly or partially covering the question, and susceptible to changing interpretation. After all, when the historical background of the two countries is remembered, there is little wonder that the fixed English doctrine never became established in America. The frontier life of our seventeenth and eighteenth century infused an actual independence into our women quite alien to the immemorial inhibitions of the common law *feme covert*. It might have been expected, too, that the doctrine should survive in England. English law symbolizes slow, imperceptible change; our reactions are swifter.

It is generally said that the reason for the English doctrine is common fairness. Since the husband at marriage took all the wife's property, it was only justice that he put her upon an equal footing with himself

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[6] Brown *v.* Ackroyd, 5 E. & B. 819 (1856); Ottaway *v.* Hamilton, 3 C. P. D. 393 (1878); Rice *v.* Shepherd, 12 C. B. (N. S.) 332 (1882).

[7] Robertson *v.* Robertson, 6 P. D. 119 (1881); Chaldecott *v.* Chaldecott, 29 L. T. R. (N. S.) 699 (1874). This ability to sue does not extend to the advocate, however. Kennedy *v.* Brown, 13 C. B. (N. S.) 677 (1863).

[8] Milne *v.* Milne, 2 P. & D. 202 (1871) (wife has separate estate); Harding *v.* Harding, 2 Sw. & Tr. 549 (1862) (wife exhibits laches). See Flower *v.* Flower, 3 P. & D. 132, 133 (1873) (wife's suit frivolous or vexatious). The determination of whether a defense is frivolous is not always easy. The interest of a third party, the wife's attorney, is involved. Often, while the wife is conscious of her guilt, her attorney proceeds in honest belief of her innocence. Franklin *v.* Franklin, note 1, *supra*. The test must be the *bona fides* of the attorney. He is cognizant of the law and the value of the evidence available, and he is requisite to the proper conduct of the wife's case. See Flower *v.* Flower, *supra*; Franklin *v.* Franklin, *supra*, at 415.

[9] Wife who has already obtained separation order. Sheppard *v.* Sheppard, [1905] P. 185. Wife found guilty on first trial. Nicholson *v.* Nicholson, 33 L. J. (P. M. & A.) 114 (1864).

[10] Gillett *v.* Gillett, 14 P. D. 158 (1889); Bullus *v.* Bullus, 26 T. L. R. 330 (1910).

[11] See 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 974.

[12] McCurley *v.* Stockbridge, 62 Md. 422 (1884); Gossett *v.* Patten, 23 Kan. 340 (1880); Bord *v.* Stubbs, 22 Tex. Civ. App. 242, 54 S. W. 633 (1899); Hays *v.* Ledman, 28 Misc. 575, 59 N. Y. Supp. 687 (1899).

[13] Compare Clarke *v.* Burke, 65 Wis. 359, 27 N. W. 22 (1886), with Sumner *v.* Sumner, 54 Wis. 642, 12 N. W. 21 (1882). See Warner *v.* Heiden, 28 Wis. 517 (1871). Compare Gordon and Belsheim *v.* Brackey, 143 Iowa, 102, 120 N. W. 83 (1909), with Stockman *v.* Whitmore, 140 Iowa, 378, 118 N. W. 403 (1908). See Clyde *v.* Peavy, 74 Iowa 47, 36 N. W. 883 (1888).

[14] Shelton *v.* Pendleton, 18 Conn. 417 (1847); Dow *v.* Eyster, 79 Ill. 254 (1875); Coffin *v.* Dunham, 8 Cush. (Mass.) 404 (1851); Wolcott *v.* Patterson, 100 Mich. 227, 58 N. W. 1006 (1894); Wing *v.* Hurlburt, 15 Vt. 607 (1843).

[15] See 1920 N. Y. CIV. CODE, § 1769; 1919 WIS. STAT., § 2361; 1915 CAL. CIV. CODE, § 137; 1911 ANN. CODE MD., Art. XLV, § 21; 1916 ME. REV. STAT., c. 65, § 6, etc.

in court.[16] Legal suit-money was a practical equity. This fundamental idea courts have variously phrased.[17] The wife has been denominated an "agent of necessity" to bind her husband; [18] the suit-money has been called a "necessary."[19] Such phraseology has misled American courts; [20] and, blinded by words, they have failed really to conceive the problem. Yet the answer to it seems self-evident when stated. The husband owes the wife a duty of support, and this duty, which exists till death, mortal or legal, parts them, perforce involves furnishing the sinews for legal defense.

That this is the true basis of the doctrine is made abundantly clear in view of the effect of modern married women legislation.[21] This has made woman, generally speaking, man's legal equal. She can contract, hold and convey all classes of property, sue and be sued in her own name. But she is not man's actual equal, because there is no mutual duty of support.[22] As regards that duty, in the nature of things, the child-bearer can never be on an equality with the wage-earner. Unless we are to say that the state shall pay the expense of defending the penniless married woman [23] — and this step, because of practical difficulties,[24] few are ready to take — it must be that the English doctrine remains sound and just. The duty to support involves the duty to see the marriage relation through to the very end, however bitter.

RECENT CASES

APPEAL AND ERROR — ACTIONS AGAINST DEFENDANTS IN THE ALTERNATIVE — DISMISSAL OF ACTION AGAINST ONE ALTERNATE DEFENDANT. — The plaintiff, injured in a collision of two cars, sued the proprietors of both cars jointly and in the alternative. He produced evidence of negligence of one defendant, but no evidence, except the fact of the collision, of the second defendant's negligence. At the close of the plaintiff's evidence the second defendant moved for judgment, and the motion was granted. The remaining

[16] See 2 BISHOP, MARRIAGE, DIVORCE, AND SEPARATION, § 976; D'Aguilar *v.* D'Aguilar, 1 Hag. Ec. 773, 787 (1794). For another practical reason see SCHOULER, DOMESTIC RELATIONS, 5 ed., § 61.

[17] See SCHOULER, DOMESTIC RELATIONS, 5 ed., § 70.

[18] See CENTURY OF LAW REFORM, 368–369.

[19] Conant *v.* Burnham, 133 Mass. 503 (1882); McCurley *v.* Stockbridge, 62 Md. 422. See SPEER, LAW OF MARITAL RIGHTS IN TEXAS, 2 ed., § 560; Wilson *v.* Ford, 3 Exch. 63, 67 (1868), *per* Channell, B.

[20] There can be no agency to terminate the agency relation. Shelton *v.* Pendleton, 18 Conn. 417 (1847). The suit-money is not a necessary. Warner *v.* Heiden, 28 Wis. 517 (1871); Dow *v.* Eyster, 79 Ill. 254 (1875); Yeiser *v.* Lowe, 50 Neb. 310, 69 N. W. 847 (1897).

[21] A typical example of this legislation is the MARRIED WOMEN'S PROPERTY ACT, 1882 (45 & 46 VICT., c. 75). For a clear exposition of "the revolution" effected by such legislation in the law, see CENTURY OF LAW REFORM, 354–378.

[22] Except possibly in Iowa! Barnes *v.* Barnes, 59 Iowa, 456 (1882).

[23] This is the procedure in Illinois. See 1917 ILL. STAT., c. 40, § 14.

[24] The free counsel assigned to the destitute in criminal cases has not proved in practice a success, because of the inferior class of attorneys available. Suggestions have been made that the proper solution is for the state to bear the expense of *all* litigation. See 10 HARV. L. REV. 242; "Lawyers' Bills—Who Should Pay Them?" 12 LAW. Q. REV. 368.